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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of LEASTAFF, INC., MEGASTAFF, INC., COMSTAFF, INC. and NELCO, INC. Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-95-20

PROPOSED DECISION

Leastaff, Inc., Megastaff, Inc., Comstaff, Inc. and Nelco, Inc. (Leastaff or Leastaff Companies) appeal a decision of the Worker's Compensation Insurance Rating Bureau (Bureau).[1]

[1] The Bureau is a licensed rating organization within the meaning of Insurance Code section 11750.1 and serves as the Insurance Commissioner's designated statistical agent under Insurance Code section 11751.5.

DISCUSSION

At its July 11, 1995 meeting, the C&R found that Leastaff, an affiliated group of employee leasing companies, had engaged in leasing arrangements wherein a majority of their clients' former employees were employed by Leastaff and then leased back to their clients. Further, the C&R found that, even though one or more of the clients had been experience rated, no separate policy reflecting Leastaff's experience modification had been issued.

There is no dispute that the Leastaff Companies were engaged in employee leasing. As described by Special Rule VI of the Manual of Rules, Classification and Basic Rates for Workers Compensation Insurance (Manual),[3] employee leasing involves an

[3] The Manual is approved by the Insurance Commissioner and constitutes part of the Commissioner's regulations. 10 Cal. Code Regs. § 2350 and 2353 et. seq.

arrangement whereby "an entity uses the services of a third party to provide its workers for a fee or other compensation." Nor is there any dispute that one or more of Leastaff's leasing arrangements involved the leaseback to its client(s) of a majority of said clients' former employees.

Special Rule VI of the 1991 Manual provides as follows:

> Any employee leasing arrangement pursuant to which (1) the employment of a majority of employees of an experience rated entity is or was transferred to one or more labor contractors and (2) the services of the employees or other individuals are thereafter provided to the entity must be written under a separate policy. The experience reported in connection with the separate policy shall be used to calculate the experience modification of the experience rated entity entering into the employee leasing arrangement. [See Experience Rating Plan, Section III, Rule (16).]

Section III, Rule 16 of the 1991 Experience Rating Plan (Plan)[4] provides as follows:

> 16. Application of Experience Modification to Policies Covering Employee Leasing Arrangements. If an experience rated entity enters into an employee leasing arrangement pursuant to which (1) the employment of a majority of employees of the experience rated entity is or was transferred to one or more labor contractors and (2) the services of the employees or other individuals thereafter are provided to the entity, then the experience modification of the entity will apply to the coverage for the labor contractor's liability to provide workers' compensation benefits for the workers leased to the entity. In addition, the experience reported in connection with the coverage for the labor

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[4]The Experience Rating Plan is promulgated as part of the Commissioner's regulations (Cal.Code Regs. tit. 10, § 2353, repealed effective January 1, 1995. Effective January 1, 1995, the Rating Plan is included in Cal.Code Regs. tit. 10, § 2353.1.)

> contractor's liability to provide workers' compensation benefits for the workers leased to the entity shall be used in the future ratings of the entity entering into the employee leasing arrangement. The experience reported in connection with the coverage for the labor contractor's liability to provide workers' compensation benefits for the workers leased to the entity shall not be used in the future ratings of the labor contractor.

The Bureau contends these rules clearly apply to Leastaff's operations and by their stated terms require the issuance of a separate policy reflecting the experience modification of the former employer. Leastaff claims that the Bureau has incorrectly applied the employee leasing rules and that the Bureau's position is inconsistent with the California Labor Code, the California Unemployment Insurance Code, Department of Insurance decisions and the Federal and State Constitutions.

The Rules

After considering the wording of the Rules themselves, as well as the history leading to their promulgation, the Court concludes that the Rules clearly cover the operations of Leastaff. Any other interpretation is strained.

Leastaff contends the use of the word "its workers" in Special Rule VI[5] indicates the rule does not apply to its clients because the clients have no employees. Leastaff's interpretation is not persuasive, especially given the complete

[5] The same language is used in Rule 16 of the Plan.

text of the Rules and the history of their development.[6] In context, "its" clearly refers to Leastaff's former employees.

The Commissioner has previously held that the rules are clear on their face and that they:

> apply only to an experience rated entity that enters into an employee leasing arrangement pursuant to which (1) the employment of a majority of employees of the entity are transferred to one or more labor contractors and (2) the services of the employees thereafter are provided to the entity. When the rules apply, coverage for the labor contractor's liability to provide coverage for workers' compensation benefits for the workers leased to the entity must be written under a separate policy in the name of the labor contractor, the experience modification and reported experience of the entity will apply to the coverage and experience reported in connection with the coverage will not be used in the future ratings of the labor contractor. In the Matter of the Appeal of Par Excellence Personnel, Inc. File No. ALB-WCA-92-4 (October 10, 1994).

While the issue in Par Excellence was whether the labor contractor should be considered the employer, the Commissioner's firm statement applies equally to the issue here.[7]

Leastaff also contends that the rule should not apply to its services because it is a sole employer leasing company with total control over its leased employees. As the Bureau points out in its brief, however, the Commissioner expressly removed the

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[6] The Rules "were adopted for the purpose of preventing experience rated employers from avoiding debit modifications through use of an employee leasing arrangement." In the Matter of the Appeal of Par Excellence Personnel, Inc., supra.

[7] Appellant's claim that the discussion in Par Excellence, supra, somehow supports their position is not persuasive.

concept of control from the employee leasing rules when the new rules were promulgated in 1990.[8]

The California Labor Code

In both their briefs and oral argument, the Leastaff companies claim that the Bureau's employee leasing rules are inconsistent with the California Labor Code and the California Unemployment Insurance Code (CUIC) and thus should not apply to appellants' operations. According to appellants, the Leastaff companies are sole employers and assume the responsibilities and risks of same. Noting that the Labor Code requires an employer to insure its workers' compensation liability risk, Leastaff argues that the Bureau cannot create the fiction that Leastaff's clients are employers.

Further, argues Leastaff, it would be inconsistent with the California Employment Development Department's rules regarding who is an employer for purposes of unemployment insurance. For example, various provisions of the CUIC would require that Leastaff be determined as the employer.

However, as noted by the Bureau, the employee leasing rule was adopted in its present form to avoid any conflict with the treatment of employee leasing by other agencies. In promulgating the rule, the Bureau "made every effort to work closely with

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[8] The prior rule had provided that it be applied if the client maintained control over the employees. Leastaff argues here that since it maintains control over its employees, the rule should not apply. However, this argument overlooks the fact that a client's control of employees is no longer a factor.

members of the employee leasing community." (C&R minutes, Docs. 318. See also In the Matter of the Appeal of Par Excellence Personnel, supra.) The Bureau met with officers of the California Chapter of the National Staff Leasing Association to explain the proposed rule. No member of the National Association appeared at the public hearing on the proposed rule or filed objections (Docs. 318). As noted in the C&R minutes, the Bureau accepted the employee leasing companies' representations that they were the employers and they are named as such on the policy (Docs. 317). Thus, appellant is incorrect when it claims the Rule does not recognize the employee leasing firm as the sole employer. What the Rule does do is create an exception to the standard treatment of past experiences for purposes of establishing the experience modifications by continuing to apply the client's experience modification.[9] The Bureau has not "decreed" that Leastaff's clients are in fact employers.